Thermico, Inc. and Associate Resources, Inc., a Single Employer *and* Local 47, International Association of Heat and Frost Insulators and Allied Workers (AWIU), AFL–CIO. 07–CA–170484

October 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Following the filing of a charge on February 23, 2016,[1] by Local 47, International Association of Heat and Frost Insulators and Allied Workers (AWIU), AFL–CIO (the Union) against Thermico, Inc. and Associate Resources, Inc. as a single employer (the Respondent or the Charged Party), the parties entered into a bilateral informal settlement agreement, which was approved by the Regional Director for Region 7 on March 15. Among other things, the settlement agreement required the Respondent to: (1) bargain collectively and in good faith with the Union, on request, as the exclusive collective-bargaining representative of its employees; (2) bargain with the Union collectively and in good faith, on request, for a period of one year after good-faith bargaining commences, in accordance with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); (3) put in writing and sign any agreement reached on the terms and conditions of employment of unit employees; and (4) post appropriate notices.

The settlement agreement also contained the following provision:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

By letter dated March 23, the Region sent the Respondent a copy of the conformed settlement agreement, with a cover letter advising the Respondent to take the steps necessary to comply with it. On May 31, the Region notified the Respondent, by a letter sent by mail and email, that the Union asserted that the Respondent had violated the terms of the settlement agreement by failing to post the Notice in a conspicuous location at its Midland, Michigan facility and by failing to respond to the Union's May 12 letter requesting bargaining. The letter further advised the Respondent of its obligation to respond to these assertions by June 7 and warned that its failure to do so may result in the issuance of a complaint and the filing of a motion for default judgment.

On June 13, the Respondent submitted its response to the Region's letter, denying the allegations of non-compliance. The Respondent asserted that it had posted the Notice and that it had never received a letter from the Union requesting bargaining. On June 14, the Region again notified the Respondent by mail that the Union asserted that the Respondent had not fully complied with the terms of the settlement agreement by engaging in good-faith bargaining and by posting the Notice in conspicuous locations for 60 consecutive days. The letter advised the Respondent of its obligation to fully comply with the terms of the notice posting and collective-bargaining provisions of the settlement agreement within 14 days of that letter. The Region's letter also warned the Respondent that its failure to comply may result in

[1] All dates are 2016 unless otherwise indicated.

the issuance of a complaint and the filing of a motion for default judgment.

On June 15, the compliance officer for the Region spoke with the Respondent's president and chief executive officer, Mark Thompson, and informed him that the Union requested bargaining in its May 12 letter to the Respondent. Thompson asserted that he did not receive the letter. By email dated June 27, the compliance officer forwarded to the Respondent a copy of the May 12 letter and the Respondent thereafter acknowledged receipt. The compliance officer attempted to call Thompson on June 29 and 30. The compliance officer was unable to leave a voice message because Thompson's voicemail indicated that his mailbox was full. In addition, the Respondent's operator did not answer calls.

On July 13, the Regional Director issued a complaint based on breach of affirmative provisions of settlement agreement (the complaint). On July 19, the General Counsel filed a Motion for Default Judgment with the Board. On July 20, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to comply with the terms of the settlement agreement by failing and refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit and by failing to post the Notice to Employees in the manner prescribed by the settlement agreement.[2] Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations of the complaint are true.[3] Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Thermico has been a corporation with an office and place of business in Midland, Michigan, and has been engaged in providing mechanical insulation services.

At all material times, Respondent Associate Resources, Inc. has been a corporation with an office and place of business in Midland, Michigan, and has been engaged in providing mechanical insulation services.

At all material times, Respondent Thermico and Respondent Associate Resources have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have had interrelated operations with common insurance, purchasing, and sales; and have held themselves out to the public as a single-integrated business enterprise.

Based on the above operations, Respondent Thermico and Respondent Associate Resources constitute a single integrated business enterprise and a single employer within the meaning of the Act.

During the 2015 calendar year, a representative period, the Respondent derived gross revenues in excess of $500,000 and purchased and received at its Midland, Michigan facility goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 47, International Association of Heat and Frost Insulators and Allied Workers (AWIU), AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Mark Thompson, president and chief executive officer of the Respondent, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time mechanical insulation installers employed by the Respondent, at and out of its facility located at 3405 Centennial Drive, Suite 2, Midland, Michigan, but excluding scaffold builders, painters, office clerical employees, managerial employees, professional employees, technical employees, delivery drivers, and guards and supervisors as defined by the Act, and all other employees.

[2] In granting the motion for default judgment, Member Miscimarra would not find, based on the evidence presented, that the Respondent failed to post the Notice to Employees in the manner prescribed by the settlement agreement. In his view, that issue remains in dispute. Nonetheless, he agrees that the Respondent has failed to comply with the settlement agreement's terms to meet and bargain in good faith with the Union.

[3] See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

On August 25, 2015, the Board certified the Union as the exclusive collective-bargaining representative of the unit.

Since August 25, 2015, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about October 5, 2015, and continuing to date, the Union requested that the Respondent meet for the purpose of negotiating a first collective-bargaining agreement.

On May 12, the Union again requested in writing that the Respondent meet for the purpose of negotiating a first collective-bargaining agreement.

During the above period, the Respondent has failed and refused to meet and bargain with the Union.

By the above conduct, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By the above conduct, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees, in violation of Section 8(a)(5) and (1). The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[4] Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent, on request, to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement. To ensure that the employees are accorded the services of their selected bargaining representative for the period provided by law, we shall construe the initial period of the certification as beginning the date when the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, supra; accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Thermico, Inc. and Associate Resources, Inc., Midland, Michigan, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Local 47, International Association of Heat and Frost Insulators and Allied Workers (AWIU), AFL–CIO as the exclusive collective-bargaining representative of employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All full-time and regular part-time mechanical insulation installers employed by the Respondent, at and out of its facility located at 3405 Centennial Drive, Suite 2, Midland, Michigan, but excluding scaffold builders,

[4] As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could "issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations." The General Counsel's motion does not explicitly request a full remedy, nor does it explicitly seek a Board Order enforcing the terms of the settlement. Rather, the motion seeks a remedy "including but not limited to" an order requiring the Respondent to (1) on request, bargain in good faith with the Union for a period of 1 year after good-faith bargaining commences, in accordance with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); (2) meet and bargain with the Union on specified dates "agreed upon by the parties, at least twice a week, and for at least 4 hours per meeting, until a complete collective-bargaining agreement or a good-faith impasse is reached;" and (3) post appropriate notices. The motion requests these remedies "[i]n addition to any such other relief deemed appropriate and necessary, including the remedies requested in the aforementioned Complaint . . . and Settlement Agreement and Notice to Employees . . . ." In these circumstances, we construe the General Counsel's motion as requesting full remedies for the violations found rather than seeking compliance with the settlement agreement, and we shall order those remedies. See *L.J. Logistics, Inc.*, 339 NLRB 729, 730–731 (2003). In addition, we note that the full remedies granted here closely mirror the remedies in the parties' settlement agreement.

In granting the General Counsel's request that we impose a bargaining schedule, we note that it has been more than 1 year since the Union's certification, and 11 months since the Union first requested bargaining, yet bargaining has not commenced. Instead, the Respondent: (1) refused the Union's requests to bargain; (2) abrogated its obligation under a bilateral settlement to bargain; and (3) failed to respond to the Union's subsequent bargaining requests. In these circumstances, we find that the requested bargaining schedule is warranted both to restore the Union's status as the employees' bargaining representative and to promote regular, meaningful bargaining.

painters, office clerical employees, managerial employees, professional employees, technical employees, delivery drivers, and guards and supervisors as defined by the Act, and all other employees.

(b) Bargain in good faith with the Union not less than twice per week, at least 4 hours per session, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

(c) Within 14 days after service by the Region, post at its facility in Midland, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 5, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 26, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER MISCIMARRA, dissenting in part.

Unlike my colleagues, I do not agree that a bargaining schedule remedy is warranted in the circumstances of this case. Such a remedy is considered by the Board to be "extraordinary," typically reserved for cases involving pervasive or egregious unfair labor practices.[1] In *Gimrock Construction, Inc.*, 356 NLRB 529 (2011), enf. denied in part 695 F.3d 1188 (11th Cir. 2012), for example, the Board imposed a bargaining schedule where the respondent had steadfastly refused to comply with the Board's June 2005 decision in which it found that the respondent had failed and refused—since October 1999—to meet and bargain with the union and provide it with requested relevant information. Although the Board's Order was thereafter enforced by the 11th Circuit, the respondent continued to ignore the union's requests to meet and bargain and provide it with the relevant information. In view of the respondent's continuing refusal—over a period of years—to comply with its bargaining order, the Board found that imposition of a bargaining schedule was necessary to ensure that the respondent meaningfully complied with its bargaining obligations as set forth in the court-enforced order. Additionally, in *Camelot Terrace*, 357 NLRB 1934 (2011), enfd. in part 824 F.3d 1085 (D.C. Cir. 2016), the Board found it appropriate to impose a bargaining schedule remedy where the respondents' "aggravated unlawful conduct 'infected the core' of the bargaining process." Id. at 1937. In doing so, the Board found that the respondents had nothing but contempt for the bargaining process and assiduously sought to restrict the dates and length of bargaining sessions, repeatedly cancelled and shortened scheduled bargaining sessions, unreasonably restricted bargaining to no more than 4 hours per session, reneged on tentative agreements without good cause, refused to bargain over or make economic proposals, and unilaterally implemented numerous changes in employees' terms and conditions of employment during the parties' negotiations. In these circumstances, the Board found that a bargaining schedule—one of two extraordinary remedies that it ordered—was necessary to eliminate the deleterious effects of the respondents' pervasive bad faith in bargaining. Id. at 1942–1943. See also *Professional Transportation, Inc.*, 362 NLRB No. 60 (2015) (imposing a bargaining schedule where the respondent had established an impermissible pattern of dilatory conduct by canceling seven consecutive bargaining sessions over a period of two months and insisting to the point of

[1] See, e.g., *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978) (characterizing the requested relief, which included a bargaining schedule, as "extraordinary"); *Crystal Springs Shirt Corp.*, 229 NLRB 4 (1977) (same).

impasse on a conditional bargaining demand); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2, 734 (2011) (ordering employer to comply with a bargaining schedule to remedy its "egregious misconduct" that included soliciting and encouraging an employee to circulate two decertification petitions while first contract bargaining was ongoing, and withdrawing recognition based on one of the petitions), enfd. 540 Fed.Appx. 484 (6th Cir 2013).

The circumstances necessitating a bargaining schedule remedy do not exist in this case. Here, the Union was certified in August 2015, and the Union first requested bargaining on October 5, 2015. On May 12, 2016, after the parties had entered into the settlement agreement, the union again requested bargaining, but the Respondent did not respond. While I agree that the Respondent unlawfully failed to comply with the settlement agreement's terms, there is no allegation or evidence that the Respondent violated the Act in any other way. Its conduct therefore falls short of the pervasive or egregious misconduct that warrants imposing a bargaining schedule. In my view, the Board's traditional remedies are sufficient to remedy the unfair labor practices found in this case. See generally *Frontier Hotel & Casino*, 318 NLRB 857 (1995). Accordingly, I respectfully dissent.

Dated, Washington, D.C. October 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 47, International Association of Heat and Frost Insulators and Allied Workers (AWUI), AFL–CIO as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanical insulation installers employed by us, at and out of our facility located at 3405 Centennial Drive, Suite 2, Midland, Michigan, but excluding scaffold builders, painters, office clerical employees, managerial employees, professional employees, technical employees, delivery drivers, and guards and supervisors as defined by the Act, and all other employees.

WE WILL bargain in good faith with the Union not less than twice per week, at least 4 hours per session, or another schedule mutually agreed upon, until a complete collective-bargaining agreement or a bona fide impasse is reached.

THERMICO, INC. AND ASSOCIATE RESOURCES, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-170484 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.